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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

DEDRA LYNN O'BRYANT,

Defendant and Appellant.

C067236

(Super. Ct. No. CM033328)

Defendant Dedra Lynn O'Bryant pled no contest to second degree commercial burglary (Pen. Code, § 459)¹ and admitted having served two prior prison terms for petty theft with a prior in exchange for the prosecution's agreement (among other things) to strike an allegation that she previously had been

¹ Undesignated statutory references are to the Penal Code. Statutory references are to those statutes in effect at the time defendant committed her crime (November 16, 2010), prior to the enactment of the Criminal Justice Realignment Act of 2011, which became operative on October 1, 2011. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 1.)

convicted of a serious/violent felony offense (§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

On appeal, defendant contends the trial court erred in refusing to award one-for-one presentence conduct credits based on her dismissed prior strike conviction. We find defendant's contention persuasive and direct the trial court to award defendant an additional 33 days for a total of 65 days of conduct credits.

FACTUAL AND PROCEDURAL BACKGROUND²

On December 29, 2010, pursuant to a plea agreement, defendant pled no contest to second degree burglary and admitted two prior prison commitment allegations with the understanding that she would be sentenced to a stipulated five-year prison term. The remaining allegations, including a strike conviction allegation, were dismissed as part of the negotiated resolution.

At the beginning of the proceedings, counsel for defendant recited his understanding of the agreement. His recitation included the following: "There's a stipulation to an aggravated prison sentence of five years. And that's going to be a halftime sentence." The prosecution said nothing about conduct credits when the negotiated resolution was presented to the court.

The plea form executed by defendant included a *Harvey* waiver³ that read as follows:

² The facts underlying the conviction are not relevant to the disposition of this appeal and are therefore not recounted.

"(HARVEY WAIVER) I STIPULATE THE SENTENCING JUDGE MAY CONSIDER MY PRIOR CRIMINAL HISTORY AND THE ENTIRE FACTUAL BACKGROUND OF THE CASE, INCLUDING ANY UNFILED, DISMISSED OR STRICKEN CHARGES OR ALLEGATIONS OR CASES *WHEN GRANTING PROBATION, ORDERING RESTITUTION OR IMPOSING SENTENCE.*"
(Italics added.)

DISCUSSION

Under former section 4019, a person imprisoned in local custody could earn conduct credit against his or her term of confinement under specified conditions. Effective September 28, 2010, section 2933 was amended to provide that certain defendants could earn presentence conduct credit at an increased rate, commonly referred to as "one-for-one credits." (Stats. 2010, ch. 426, §§ 2, 1, respectively, eff. Sept. 28, 2010.) Any inmate who was required to register as a sex offender, who had committed a serious felony, or who had a prior strike conviction, was not entitled to the benefit of the additional credit formula and could only accrue conduct credit at the prior rate of "one-for-two." (former § 2933, subd. (e).) The amendment applied to any inmate whose crime was committed on or after the effective date of the amendment. (See former § 4019, subd. (g), as amended by Stats. 2010, ch. 426, § 2).)

Defendant was sentenced on January 19, 2011. Prior to sentencing, defendant accrued 65 days of presentence custody

³ *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

credits. At sentencing, defense counsel requested that the court award an equal number of conduct credits⁴ under the September 28, 2010 amendments to section 4019 and this court's then-recent decision in *People v. Jones* (2010) 188 Cal.App.4th 165, in which review has since been granted (Dec. 15, 2010, S187135) (*Jones*). The trial court denied the request and awarded defendant only 32 days' conduct credit.

Defendant contends on appeal that in order for a prior conviction to render her ineligible for increased credits, it must be pled and proved by the prosecution. When defendant pled no contest, the trial court struck the alleged serious felony prior conviction for all purposes. Defendant further contends that the plea agreement did not include an agreement that the prosecution was relieved of its obligation to prove the strike for conduct credit purposes. She also contends that if the parties had intended that the strike conviction be stricken only for purposes of doubling the prison term and not for the calculation of conduct credits, then such a provision would have been included in the agreement.

Here, because the *Harvey* waiver signed by defendant does not expressly cover presentence conduct credits, we need not reach the issue of whether the prior strike conviction must be pled and proved before it can serve as the basis for increasing

⁴ Defense counsel mistakenly believed defendant had accrued 64, rather than 65, days of actual custody credit.

defendant's punishment by denying her additional presentence custody credits under the amendments to former section 4019.⁵

The People recognize that the purported *Harvey* waiver is a threshold issue and argue that the waiver language includes presentence conduct credits. Specifically, the People contend that the "clear and explicit language" of the *Harvey* waiver "clearly permitted the trial judge to consider any and all dismissed special allegations -- such as her prior strike -- in making relevant sentencing choices and decisions."

Defendant's answer to this argument is two-fold. First, she asserts that the parties' plea agreement contemplated that her alleged prior conviction would not be used to render her ineligible for increased credits. Defense counsel's unchallenged description of the agreement as providing for "a

⁵ This court previously concluded disqualification from the more favorable one-for-one formula for conduct credits was equivalent to an increase in punishment, which requires the prosecution to plead and prove the disqualifying fact of a prior conviction for a serious felony; based on this requirement, we found that a trial court could strike the disqualifying fact for purposes of conduct credits. (*Jones, supra*, S187135.) Subsequent decisions touching on the issue are now pending in the Supreme Court awaiting the disposition of the lead case, *People v. Lara* (2011) 193 Cal.App.4th 1393, review granted May 18, 2011, S192784, which had agreed with the analysis in *Jones*. Contra are *People v. Voravongsa* (2011) 197 Cal.App.4th 657, review granted August 31, 2011, S195672 (pleading and proof are not required and thus court cannot strike fact of prior conviction for purposes of conduct credits), *id.* at page 661, footnote 4 (noting additional unpublished decisions on issue in which review granted) and *People v. James* (2011) 196 Cal.App.4th 1102, review granted August 31, 2011, S195512 (no requirement to plead and prove, also noting no increase in punishment).

halftime sentence” makes sense only if the plea included an agreement that defendant would receive day-for-day conduct credits. Second, the form *Harvey* waiver used in this case says nothing about its effect on the calculation of conduct credits and thus cannot be read to allow defendant’s dismissed strike conviction to render her ineligible for increased credits.

The defendant in *Harvey* pled guilty to two counts of robbery with the use of a firearm; a third count of robbery was dismissed pursuant to a plea agreement. (*Harvey, supra*, 25 Cal.3d at p. 757.) In sentencing the defendant to the upper term, the trial court relied upon the dismissed robbery count as an aggravating factor. (*Id.* at pp. 157-158.) Our high court held that this was error stating, “In our view, under the circumstances of this case, it would be improper and unfair to permit the sentencing court to consider any of the facts underlying the dismissed count three for purposes of aggravating or enhancing defendant’s sentence. Count three was dismissed in consideration of defendant’s agreement to plead guilty to counts one and two. Implicit in such a plea bargain, we think, is the understanding (*in the absence of any contrary agreement*) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count.” (*Harvey, supra*, at p. 758, italics added.) It was from the parenthetical in the quoted text that the notion of a *Harvey* waiver developed. (*People v. Goulart* (1990) 224 Cal.App.3d 71, 80-81.) In *People v. Martin* (2010) 51 Cal.4th 75, our high court noted that a plea agreement is

"in the nature of a contract" (*Martin, supra*, 51 Cal.4th at pp. 77, 79), and further observed, "[s]imply stated, the *Harvey* rationale is that 'a deal is a deal.'" (*Id.* at p. 80.)

The plea form utilized here says only that the court may consider defendant's criminal history when "granting probation, ordering restitution or imposing sentence." The form makes no express reference to the calculation of presentence conduct credits. We reject the People's argument that the words "impose sentence" in the *Harvey* waiver include the awarding of conduct credits, especially in light of the People's argument that former section 4019 is not a sentencing statute. (See *People v. Van Buren* (2001) 93 Cal.App.4th 875, 880 ["Section 2933.1 is not a sentencing statute"].) Moreover, no custom and usage for the plea form has been identified from which we can imply that the *Harvey* waiver includes presentence conduct credits. (*People v. Haney* (1989) 207 Cal.App.3d 1034, 1039 & 1040.) Nor are any of the conditions for determining the existence of an implied covenant present here. (See *Haney, supra*, at p. 1039.) Since there was no express agreement that the strike conviction could be used to deprive defendant of one-for-one credits, the *Harvey* rule applies. In the absence of a contrary agreement, the dismissed strike conviction cannot be used for any purpose.⁶

⁶ We note that the language counsel used to describe the negotiated agreement was ambiguous and potentially misleading for defendant. In context, counsel's comment, "that's going to be a halftime sentence," can be understood as referencing only the credits defendant could receive in state prison and not defendant's presentence credits. Yet, because defendant's state

DISPOSITION

The judgment is modified to provide that defendant is awarded 65 days of conduct credit. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting 65 days of conduct credit and to forward a certified copy to the Department of Corrections and Rehabilitation.

_____, MURRAY, J.

We concur:

_____, BLEASE, Acting P. J.

_____, ROBIE, J.

prison credits are not guaranteed, but rather must be earned, it is not accurate to call defendant's state prison sentence a "halftime" sentence. In any event, we need not address the meaning of defense counsel's comments because in the absence of a *Harvey* waiver expressly covering conduct credits, custom and usage evidence concerning the form used here, or the conditions required for an implied covenant, the dismissed strike conviction cannot be used against defendant for any purposes, including depriving her of one-for-one credits.